88- 1855

Supreme Court, U.S.
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NO. _____

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

GAILE HENRY, SR.,
*Petitioner*

v.

BEAUMONT IRON & METAL CORPORATION, BEAUMONT IRON & METAL CORPORATION PROFIT SHARING PLAN, GAILE HENRY, JR., AND FIRST CITY NATIONAL BANK OF BEAUMONT,
*Respondents*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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## QUESTIONS PRESENTED FOR REVIEW

(1) Does a mandatory injunction in favor of a creditor which prospectively requires an ERISA plan participant to pay his retirement benefits to the creditor when the participant receives his benefits from the trustee of the plan constitute a wrongful garnishment or attachment which is prohibited by ERISA?

(2) In response to a creditor's request for a mandatory injunction against a plan participant, does an agreement by the participant's attorney to enter an order which prospectively requires a plan participant to deposit his retirement benefits, when received from the plan, into an Individual Retirement Account subject to further orders of the court constitute a voluntary alienation which is prohibited by ERISA?

(3) When the creditor is the plan sponsor, and when the plan administrator is an officer of the creditor and controls the actions of the creditor, does the following constitute an unlawful attachment prohibited by ERISA and a breach of fiduciary duty by the plan administrator:

a. causing the creditor to obtain a mandatory injunction prospectively requiring the participant to deposit his retirement benefits into an IRA, subject to further court orders, when such funds are received by the participant from the trustee of the plan;

b. causing the creditor's attorney to take possession of the participant's check from the trustee of the plan and refusing to let the participant have the check unless the participant agrees to restrict his right to deposit the funds into an IRA of his choice;

c. causing the creditor to obtain a court order requiring the participant to endorse the check in the possession of the creditor's attorney and then deposit the check into the registry of the court?

(4) Do the actions described in Issue No. 3 constitute prohibited transactions under ERISA?

(5) If the trustee of the plan knows about the creditor's actions, does the trustee have an affirmative duty to take steps to prevent such action?

(6) If the trustee acquiesces in the creditor's actions in order to permit the creditor to obtain the participant's benefits so that the creditor can use the money to pay the creditor's debt to the trustee, has the trustee engaged in a prohibited transaction and breached its fiduciary duty to the participant?

(7) Does the mere act by the trustee of writing a check and delivering it to the attorney for the creditor of a participant satisfy the obligation of the trustee to distribute benefits in accordance with the terms of the plan and ERISA?

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## STATEMENT OF JURISDICTION

The Judgment of the Court of Appeals for the Fifth Circuit was entered on January 18, 1989. An Order denying the Petition for Rehearing was entered on February 15, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATEMENT OF STATUTORY PROVISIONS

(1) 26 U.S.C. § 401(a)(13):

> A trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that benefits provided under the plan may not be assigned or alienated. . . .

(2) Treas. Reg. § 1.401(a)-13(b):

> *No assignment or alienation*—(1) *General rule.* Under section 401(a)(13), a trust will not be qualified unless the plan of which the trust is a part provides that benefits provided under the plan may not be anticipated, assigned (either at law or in equity), alienated or subject to attachment, garnishment, levy, execution or other legal or equitable process.

(3) 29 U.S.C. § 1104(a)(1)(A)(i):

> Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—
>
> (A) for the exclusive purpose of:
>
> (i) providing benefits to participants and their beneficiaries;

(4) 29 U.S.C. 1105(a):

In addition to any liability which he may have under any other provision of this part, a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances:

(1) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach;

(2) if, by his failure to comply with section 1104(a)(1) of this title in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or

(3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

(5) 29 U.S.C. 1106(1)(D):

Except as provided in section 1108 of this title:

(1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect—

(D) transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan;

(6) 29 U.S.C. 1106(b):

A fiduciary with respect to a plan shall not—

(1) deal with the assets of the plan in his own interest or for his own account,

(2) in his individual or in any other capacity act in any transaction involving the plan on behalf of a

party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries, or

(3) receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.

## STATEMENT OF THE CASE

### A. Summary of Proceedings

This action was brought by Petitioner, Gaile Henry, Sr. ("Senior"), under the provisions of the Employment Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 et seq., to recover the retirement benefits to which Senior was entitled under the provisions of a profit sharing and pension plan ("the Plan") sponsored by Senior's former employer, Beaumont Iron & Metal Corporation ("Bimco"), for which First City National Bank of Beaumont ("the Bank") acted as trustee. Both Senior and the Respondents filed Motions for Summary Judgment. The trial court denied Senior's Motion and entered summary judgment in favor of the Respondents. Senior appealed the judgment of the trial court to the Court of Appeals for the Fifth Circuit. This is a Petition for Writ of Certiorari to review the opinion of the Fifth Circuit affirming the Summary Judgment entered in favor of Respondents.

### B. The Parties

Senior is 68 years old. In 1965, he started a scrap metal business which is now known as Bimco. Eventually his son, Junior, gained control of the business and

terminated Senior's employment. Junior is the Plan Administrator of the Plan.

The Bank acted as trustee for the Plan. In addition, while acting as trustee the Bank was also a creditor of Bimco and was owed in excess of $700,000.00 by Bimco. The Bank considered the Bimco account to be a problem credit.

After Junior fired Senior, Junior decided to terminate the Plan and cause the Plan to distribute all benefits to the Plan participants, including Senior. At about the same time, Bimco filed suit against Senior in October 1986, alleging that Senior owed Bimco approximately $200,000.00 on a promissory note. Later, on December 12, 1986, Bimco amended its lawsuit and alleged that Senior had no assets, except his retirement benefits under the Plan, with which to satisfy any judgment that might be rendered in favor of Bimco against Senior. Bimco further alleged that Senior had threatened to hide his retirement benefits once they were distributed to him, and Bimco sought to enjoin Senior from using his retirement benefits for any purpose other than to pay the alleged note receivable to Bimco.

Since Senior had planned to deposit his retirement benefits into an Individual Retirement Account when he received his benefits from the Plan, on December 19, 1986 Senior's attorney agreed to the entry of an order requiring Senior to place his funds into an Individual Retirement Account when the funds were distributed by the Plan to Senior, rather than engage in an unnecessary evidentiary hearing in connection with Bimco's application for an injunction.

After the Plan was terminated, the Bank issued a check for $200,000.00 payable to Senior and gave the check to Bimco's attorney on December 31, 1986. Although Senior attempted to obtain possession of the check and deposit the funds into two separate Individual Retirement Accounts, Bimco's attorney refused to release the check to Senior unless Senior agreed to certain restrictions on the accounts which would prevent Senior's access to and use of the funds and would further subject the funds to control of the state court for the benefit of Bimco.

When Senior refused to agree to such restrictions and insisted on his right under ERISA to rollover his retirement benefits into an Individual Retirement Account, Bimco sought a court order, at a time when Senior was not represented by counsel, requiring Senior to endorse the check and deposit the check into the registry of the state court. Under threat of contempt, Senior endorsed the check and Bimco's attorney took the check and deposited it with the registry of the state court. Subsequently, a Summary Judgment was entered against Senior in the state court for approximately $250,000.00, the funds in the registry of the state court were awarded to Bimco, and Bimco in turn paid the money to the Bank to reduce Bimco's loan balance.

Throughout the course of the state court proceedings, the Bank closely monitored the efforts of Junior and Bimco to obtain Senior's retirement benefits for the purpose of ultimately reducing Bimco's loan at the Bank.

After Senior's retirement benefits were deposited into the registry of the state court, but before those funds were awarded to Bimco, Senior filed suit in federal district court under the provisions of ERISA and sought to enjoin

Bimco and the Bank from taking any further action to seize Senior's retirement benefits. Although the Bank was timely served with the federal court lawsuit, the Bank failed to take any action on behalf of Senior in the state court case to protect Senior's interest, and the Bank ultimately received the benefit of Senior's retirement funds.

## ARGUMENT

Under Chapter 61 of the Texas Civil Practice and Remedies Code, a writ of attachment is available if the Defendant has hidden or is about to hide his property for the purpose of defrauding his creditors, or if the Defendant is about to remove his property from the state without leaving an amount sufficient to pay his debts, or the Defendant is about to convert all or part of his property to money for the purpose of placing it beyond the reach of his creditors. These are precisely the grounds alleged by Bimco in its Application for Temporary Injunction. If Bimco had styled its request for an injunction an "Application for Prejudgment Writ of Attachment" or "Application for Prejudgment Writ of Garnishment", and had sought to levy the writ of attachment or writ of garnishment against the assets in the Plan, there would have been an obvious and flagrant violation of the specific provisions of ERISA and the Plan.

Since Junior and Bimco had decided to terminate the Plan and, therefore, knew that benefits under the Plan would soon be distributed to Senior and the other Plan participants, Bimco did two things in an attempt to avoid the strict provisions of ERISA. First, Bimco styled its pleading "Application for Temporary Injunction" rather than "Application for Writ of Attachment". Second,

rather than seeking an attachment of the funds on deposit in the Plan, Bimco sought a mandatory injunction requiring Senior's retirement benefits to be deposited by Senior in the registry of the court upon receipt of the retirement benefits by Senior. From the perspective of Senior, the result is the same—he involuntarily loses his retirement benefits to a creditor.

In order to circumvent the strict prohibitions of ERISA against attachment or alienation of retirement benefits, Bimco argues that the injunction is only effective once the funds have been "distributed" by the Bank on behalf of the Plan to Senior, and that after "distribution" the retirement benefits are no longer protected by ERISA. This argument puts form over substance, since from the perspective of Senior, the Plan participant, there is no difference in the result whether the Court enters an order for mandatory injunction against Senior or an order for writ of attachment against the Plan.

All of the actions taken by Bimco and the Bank were directed towards the purpose of obtaining Senior's retirement benefits for the purpose of reducing Bimco's loan to the Bank. This ultimate result was accomplished through the use of legal and equitable process issued by the state court.

The Opinion of the Fifth Circuit does not address or discuss either the law or the facts of this case. Instead, the per curiam opinion apparently sanctions the procedure used by Bimco to circumvent the express prohibitions of ERISA against garnishment, attachment, or voluntary alienation. This approach renders the prohibitions of ERISA absolutely meaningless since all a creditor needs to do is to obtain an injunction requiring a Plan

participant to deposit all retirement funds, when received from a qualified retirement plan, into the registry of the court in which the creditor is seeking to force his claim against the Plan participant. Either way, if the conduct of Binco is sanctioned by this Court, then all creditors of participants in ERISA plans will be able to circumvent the anti-assignment and anti-alienation provisions of ERISA by seeking injunctions which require the Plan participants to pay their benefits to the creditor upon distribution of benefits to the participant.

The provisions of ERISA should not be so narrowly construed since the purpose of ERISA is to "assure American workers that they may look forward with anticipation to retirement with financial security and dignity, without fear that this period of life will be lacking in the necessities to sustain them as human beings within our society". S. Rep. No. 93-127, 93rd Cong., 2d Sess. (1974), reprinted in U.S. Code Cong. & Admin. News, pp. 4639, 4849 (1974). Congress intended that an employee's accrued benefits may not be reached by judicial process of any kind in aid of a third party creditor, let alone a fiduciary such as the Plan Administrator. Treas. Reg. § 1.403(a)-13(b)(1); *Tenneco v. First Virginia Bank of Tidewater,* 698 F.2d 688 (4th Cir. 1983); *General Motors Corp. v. Buha,* 623 F.2d 455 (6th Cir. 1980).

## CONCLUSION AND REQUEST FOR RELIEF

Although the opinion of the Court of Appeals does not specifically address or discuss either the facts or the law involved in this case, the result reached by the Court of Appeals threatens to undermine the integrity of the entire retirement system since it allows creditors to seize all retirement benefits through the use of mandatory injunctions. Accordingly, it is important that the Supreme Court grant this Petition for Writ of Certiorari and review this case.

Respectfully submitted,

By: /s/

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*Counsel of Record*
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## CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing pleading has been sent by certified mail, return receipt requested, to the following attorneys of record this 12th day of May, 1989.

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/s/
C. LELAND HAMEL

## APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 88-2192

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GAILE HENRY, SR.,
Plaintiff-Appellant,

v.

BEAUMONT IRON AND METAL
CORPORATION, ET AL.,
Defendants-Appellees.

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Appeal from the United States District Court for the
Eastern District of Texas

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ON PETITION FOR REHEARING

(February 15, 1989)

Before REAVLEY, HIGGINBOTHAM and SMITH, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ THOMAS M.REAVLEY
United States Circuit Judge

## APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 88-2192

---

GAILE HENRY, SR.,
Plaintiff-Appellant,

v.

BEAUMONT IRON & METAL CORP., ET AL.,
Defendants-Appellees.

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Appeal from the United States District Court for the
Eastern District of Texas
(CA-B-87-0503)

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(January 18, 1989)

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Before REAVLEY, HIGGINBOTHAM and SMITH, Circuit Judges.

PER CURIAM:*

The summary judgment in favor of the defendants is affirmed because, as the district court said in its order

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

of February 25, 1988, the Profit Sharing Plan was terminated and full distribution of plaintiff's benefits was made to him in 1986. Plaintiff's attorney agreed to the termination of the plan in November and to the trustee bank's delivery on December 31 of checks payable to plaintiff, to be held by S. L. Greenberg. This delivery was made in order to ensure that plaintiff would be deemed to have received this distribution in 1986 for income purposes.

Prior to 1987 there is no evidence that any defendant breached a fiduciary duty owed to plaintiff under ERISA or the plan. The bank acted only as was authorized by plaintiff. Plaintiff on January 6, 1987 agreed to the court's order under which the $200,000 was to be deposited and to be subject to subsequent court judgment. That election by plaintiff and the court's subsequent judgment cannot be undone by the present suit, because the $200,000 was not protected by ERISA on January 6, 1987, and could not be said to have been wrongfully attached.

AFFIRMED.

## APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

C. A. NO. B-87-0503-CA

GAILE HENRY, SR.

v.

BEAUMONT IRON AND METAL CORPORATION, BEAUMONT IRON AND METAL CORPORATION PROFIT SHARING PLAN, GAILE HENRY, JR., and FIRST CITY NATIONAL BANK OF BEAUMONT

(Filed February 25, 1988)

ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT, DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, AND FINAL JUDGMENT

ON THE 25th day of February, 1988, came on to be considered the Defendants, Beaumont Iron and Metal Corp. ("Beaumont Iron"), Beaumont Iron and Metal Corp. Profit Sharing Plan ("Profit Sharing Plan"), Gaile Henry, Jr., and First City National Bank of Beaumont ("First City")'s Motions for Summary Judgment. The Plaintiff, Gaile Henry, Sr.'s Motion for Summary Judgment also came on for consideration. The Court, after reviewing the Defendants' Motions, the Plaintiff's Response thereto, the Plaintiff's Motion and the Defendants' Responses in Opposition thereto, as well as the affidavits, exhibits, arguments and authorities submitted by the respective

counsel, finds that a distribution to Gaile Henry, Sr. (Plaintiff herein) of his vested benefits in the terminated Profit Sharing Plan was made to him, and the distributed funds were not thereafter protected by ERISA. The Court finds that no improper alienation, attachment or garnishment occurred as a result of the conduct of, or actions by the Defendants in Cause No. A-125,223 before the 58th Judicial District Court, Jefferson County, Texas (hereinafter "state court action"). At the time the Plaintiff filed this litigation (April 10, 1987), all funds had been distributed from the Profit Sharing Plan Trust Account and the Profit Sharing Plan had been terminated. Additionally, Plaintiff failed to exhaust his administrative remedies as required by the Profit Sharing Plan and ERISA during the time preceding the distribution of his retirement benefits. Although funds may be traceable to an ERISA approved plan, the Court finds that those funds are not protected by ERISA once distribution is made. The Court also finds no evidence that First City, as Trustee of the Profit Sharing Plan, breached any of its fiduciary duties to Plaintiff. Based on the foregoing, the Court finds that Defendants are entitled to summary judgment, as no genuine issue of material fact exists; that the Defendants have no liability to the Plaintiff under ERISA or the causes of action set forth in Plaintiff's Original Complaint. The Defendants' Motions for Summary Judgment should be granted that the Plaintiff take nothing by reason of his suit. The Plaintiff's Motion for Summary Judgment should be denied. It is, therefore,

ORDERED, ADJUDGED and DECREED that the Defendants, Beaumont Iron and Metal Corp., Beaumont Iron and Metal Corp. Profit Sharing Plan, Gaile Henry, Jr., and First City National Bank of Beaumont's Motions

for Summary Judgment are hereby GRANTED and said Defendants are DISCHARGED from any liability to the Plaintiff and judgment is awarded the Defendants that the Plaintiff take nothing by reason of this suit. It is further,

ORDERED, ADJUDGED and DECREED that the Plaintiff, Gaile Henry, Sr.'s Motion for Summary Judgment is hereby DENIED.

SIGNED this 25th day of February, 1988.

/s/ Signature Illegible
United States District Judge